

RENDERED: JANUARY 12, 2007; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky
Court of Appeals

NO. 2006-CA-001001-WC

BRUNSWICK BOWLING LEAGUE

APPELLANT

v. PETITION FOR REVIEW OF A DECISION
OF THE WORKERS' COMPENSATION BOARD
ACTION NO. WC-99-54628

JOHN SIMS; HON. SHEILA C.
LOWTHER, CHIEF ADMINISTRATIVE
LAW JUDGE; AND WORKERS'
COMPENSATION BOARD

APPELLEES

OPINION
AFFIRMING

** ** * * *

BEFORE: JOHNSON¹ AND TAYLOR, JUDGES; BUCKINGHAM,² SENIOR JUDGE.

JOHNSON, JUDGE: Brunswick Bowling League has petitioned for review of an opinion of the Workers' Compensation Board entered on April 7, 2006, which reversed and remanded an order entered by the Administrative Law Judge on November 18, 2005, denying

¹ Judge Rick A. Johnson completed this opinion prior to the expiration of his term of office on December 31, 2006. Release of the opinion was delayed by administrative handling.

² Senior Judge David C. Buckingham sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statutes (KRS) 21.580.

John Sims's motion to reopen his workers' compensation claim. Having concluded that the Board has not overlooked or misconstrued controlling statutes or precedents nor has it committed an error in assessing the evidence so flagrant as to constitute a gross injustice,³ we affirm.

Sims was injured on November 11, 1999, while working for Brunswick. He filed an application for resolution of his workers' compensation claim on March 7, 2001, alleging injuries to his neck, left shoulder, and arm. On November 30, 2001, an ALJ found Sims to have an 18% permanent impairment rating based on the combined rating of 14% for the left shoulder and 5% for the neck. The impairment rating was based on the assessment of Sims's treating physician at the time, Dr. David Thurman.

Sims filed a motion to reopen his claim on March 3, 2004, on the basis that Brunswick had refused to authorize medical treatment in the form of injection therapy for his thoracic spine. Sims also alleged a change of condition by way of an increase in disability since the original award. The motion to reopen was granted and the claim was assigned to an ALJ for adjudication. Brunswick filed a motion to dismiss Sims's claim asserting that he failed to produce evidence of a worsening of his impairment. The motion was denied and the claim proceeded with the taking of proof on reopening. Both

³ Western Baptist Hospital v. Kelly, 827 S.W.2d 685, 687-88 (Ky. 1992).

parties presented evidence in regard to the issue of the contested thoracic spine treatment; however, no evidence was presented on the issue of a worsening of the neck or shoulder injuries.

On November 1, 2004, an opinion and order was entered by the ALJ dismissing Sims's claim on reopening. The ALJ found based upon medical records that Sims knew of his thoracic spine injury at the time he filed his original claim, but had failed to assert the injury. As such, Sims was barred under the "merger" provision of KRS 342.270(1) from asserting a claim based upon an injury to his thoracic spine. The ALJ also concluded that Sims had failed to prove he was entitled to an increase in his percentage of permanent disability on reopening based on a lack of evidence of an increase in impairment. Sims appealed to the Board the ALJ's finding that treatment for his thoracic spine was not compensable. The Board affirmed the decision. Sims did not appeal the ALJ's dismissal of his claim for an increase in the percentage of his permanent disability.

Sims filed a second motion to reopen on October 24, 2005, which is the subject of this petition for review, alleging a worsening of his condition since the time of the original opinion and award. In support of his allegation, Sims submitted medical records from Dr. John Lach dating from September 9, 2003, as well as a letter from Dr. Lach dated December 16, 2004,

and a September 28, 2005, note from Dr. Lach written on a prescription pad. In the September 28, 2005, note, Dr. Lach indicated that he had been advised of Dr. Thurman's assessment of a 14% impairment related to the left shoulder and a 5% impairment related to the neck. Dr. Lach noted that he agreed with the 14% rating, but stated that he would rate Sims's neck injury as a "Category II - 8%" impairment under the DRE model for the assessment of cervical spine impairment. As such, Dr. Lach stated that his impairment ratings of 14% and 8% would yield a combined whole person impairment rating of 21%.

Brunswick objected to this second motion to reopen on the grounds that it was identical to the first motion to reopen which had been fully adjudicated and dismissed. Brunswick asserted that there was no evidence of a change in diagnosis or more recent diagnostic studies or evaluations showing a worsening of Sims's condition. Brunswick further asserted that Dr. Lach agreed that Sims's 14% rating for the shoulder was unchanged from the time of the original award and that Dr. Lach placed Sims's cervical impairment rating in the same category as Dr. Thurman's assessment which was used for the original award. The only difference, according to Brunswick, was that Dr. Lach placed Sims in the high end of the range for a Category II impairment whereas Dr. Thurman had assessed the low end of the Category II range. Brunswick argued that the additional 3%

impairment assessed by Dr. Lach was based upon subjective complaints of pain rather than "objective medical evidence" as required for a reopening based upon a change of disability pursuant to KRS 342.125(1)(d).

On November 18, 2005, the Chief Administrative Law Judge entered an order denying Sims's motion to reopen on the grounds that Sims had failed to make a prima facie showing of a change of condition. Sims appealed this order to the Board. In a 2-1 decision, the Board reversed the order of the CALJ and remanded the claim for entry of an order reopening the claim for adjudication on the merits. This petition for review followed.

Upon review, this Court will only reverse the Board's decision if it has overlooked or misconstrued a controlling statute or so flagrantly erred in evaluating the evidence to result in gross injustice.⁴ Brunswick argues that the Board erred in reversing the order of the CALJ on the grounds that the Board applied the wrong standard of review. We disagree. It is well settled that an ALJ is the sole fact-finder in regard to a workers' compensation claim and has the sole authority to evaluate the quality, character, and substance of the evidence before her.⁵ Likewise, an ALJ is at liberty to assign the weight to be given to the evidence and may accept or reject testimony

⁴ Western Baptist Hospital, 827 S.W.2d at 687-88.

⁵ Paramount Foods, Inc. v. Burkhardt, 695 S.W.2d 418 (Ky. 1985).

as is deemed proper.⁶ However, where the evidence compels a different result, the Board may properly reverse the findings of an ALJ.⁷

The only evidence presented in support of Sims's motion to reopen were the records of Dr. Lach as well as his letter of December 16, 2004, and the note of the prescription pad of September 28, 2005, assigning a higher impairment rating for the cervical spine than was contained in the original award. There was no rebuttal evidence submitted by Brunswick. KRS 342.125(1)(d) states as follows:

- (1) Upon motion by any party or upon an administrative law judge's own motion, an administrative law judge may reopen and review any award or order on any of the following grounds:

. . . .

- (d) Change of disability as shown by objective medical evidence of a worsening or improvement of impairment due to a condition caused by the injury since the date of the award or order.

Prior to a claim being assigned for adjudication on the merits under KRS 342.125(1)(d), a claimant must make a prima facie showing in its motion of sufficient information to demonstrate a

⁶ Caudill v. Maloney's Discount Stores, 560 S.W.2d 15, 16 (Ky. 1977).

⁷ Special Fund v. Francis, 708 S.W.2d 641 (Ky. 1986).

substantial possibility of success in the event evidence is taken in regard to the claim.⁸

In this case, we agree with the Board that Sims met his burden of making a prima facie showing that he had had a change in disability based upon Dr. Lach's September 28, 2005, note indicating a worsening of impairment. As the Board noted, although Dr. Lach did not explain the basis for his assessment of an 8% impairment rating, his medical chart and notes which were attached to Sims' motion to reopen are objective medical evidence sufficient to meet the threshold to sustain a motion to reopen under KRS 342.125(1)(d) even though he may yet be unsuccessful on the merits of his claim when it is considered upon reopening.

Based upon the foregoing, the opinion of the Workers' Compensation Board is affirmed.

ALL CONCUR.

BRIEF AND ORAL ARGUMENT FOR
APPELLANT:

Thomas M. Edelen
Louisville, Kentucky

BRIEF AND ORAL ARGUMENT FOR
APPELLEE JOHN SIMS:

Wayne C. Daub
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⁸ Stambaugh v. Cedar Creek Mining Co., 488 S.W.2d 681, 682 (Ky. 1972).